University of Miami Law Review

Volume 27
Number 3 *Volume 27 Numbers 3-4 (Spring & Summer 1973)*

Article 8

7-1-1973

The Abortion Decision: Right of Privacy Extended

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CASES NOTED

THE ABORTION DECISION: RIGHT OF PRIVACY EXTENDED

Jane Roe,[1] who was unmarried and pregnant,[2] sought declaratory and injunctive relief from the effect of Texas statutes prohibiting abortions in all cases except those in which the woman's life was endangered.[3] Unable to obtain a legal abortion in Texas, and unable to afford an abortion elsewhere, she brought a class action in which she alleged that the Texas statutes were vague, unconstitutional on their face, and an abridgment of her constitutional right of privacy under the first, fourth, fifth, ninth, and fourteenth amendments. The action[4] was heard by the Federal District Court for the Northern District of Texas (sitting as a three-judge panel) which granted declaratory relief, holding that the fundamental rights of single and married women to choose whether to beget children are protected by the ninth amendment via the fourteenth, and that the Texas statutes were void as an infringement upon those rights. The court dismissed the application for injunctive relief.[5] On appeal,[6] the United States Supreme Court, in a 7-2 decision *held*, affirmed:[7] The Texas statutes abridged Roe's fourteenth amendment right of privacy. However, the state has legitimate interests in the abortion decision which attach at various stages of pregnancy so that: (1) for the stage of pregnancy prior to the end of the first trimester the abortion decision is solely within the discretion of the pregnant woman and her physician; (2) for the stage subsequent to the first trimester, the state, in furtherance of its interest in the health of the female, may regulate the abortion procedure in any manner that is reasonably related to her health; and (3) for the stage subsequent to viability,[8] the state, in furtherance of its interest in the

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1. The name is a pseudonym.

2. See note 46 *infra* & accompanying text.

3. TEX. PEN. CODE ANN. arts. 1191-94 & 1196 (1961). These statutes, which had remained essentially unchanged since 1898, are typical of the abortion statutes enacted by many states in the mid-nineteenth century, which are still in effect in twenty-one states today. Roe v. Wade, 93 S. Ct. 705, 738 n.1 (1973) (dissent).

4. A licensed physician, who had two criminal abortion prosecutions pending against him, was permitted to intervene. The district court simultaneously entertained an action by a couple who also sought to attack the Texas statutes despite the fact that the woman was not yet pregnant. The district court held that the couple failed to present a justiciable controversy, and proceeded to the merits as to Roe and the physician only. Roe v. Wade, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970).

5. *Id.* at 1224. The Supreme Court later declined decision on the injunction issue, stating that they assumed the Texas authorities would follow the *Wade* decision thereby making a decision on injunctive relief unnecessary. Roe v. Wade, 93 S. Ct. 705, 733 (1973).

6. The appeal was taken pursuant to 28 U.S.C. § 1253 (1966).

7. The Supreme Court held that the physician did not have standing to sue and reversed the district court on that point. Roe v. Wade, 93 S. Ct. 705, 714 (1973).

8. Viability is that point in fetal development (occurring from 24 to 28 weeks) when

"potentiality of human life" may regulate and even proscribe abortion except when necessary for the preservation of the life or health of the female. *Roe v. Wade*, 93 S. Ct. 705 (1973).[9]

At common law an abortion performed before quickening, the first movement of the fetus felt by the mother,[10] was not a criminal offense.[11] Lord Coke, however, stated that the abortion of a woman "quick with childe . . . [was] a great misprision. . . ."[12] Subsequent to Coke's pronouncement, virtually every court confronted with the abortion question has distinguished between pre-quickening and post-quickening abortion, holding only the latter to be criminal.[13] One legal scholar, after examining the cases relied upon by Coke, has stated that Coke, in all probability, misstated the law of his time.[14] Consequently, at common law, it is doubtful that abortion should have been a crime at all, regardless of the development of the fetus.[15] Therefore, since all of the states (except Louisiana) have adopted the English common law, it has been argued, that until state legislatures began to enact statutes proscribing abortion, a woman had an unqualified right to abort at any stage of pregnancy. Viewed in this light, the *Wade* decision, instead of representing a radical new approach to the abortion issue, can be construed to represent a moderate step backwards!

It is well established that there is a fundamental right of privacy which exists within the Constitution though not expressly enunciated therein.[16] The right of personal privacy[17] has been held to arise from

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the fetus is capable of living outside of the womb, albeit with artificial aid. L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971).

9. In Doe v. Bolton, 93 S. Ct. 739 (1973), a companion of *Roe v. Wade*, several Georgia abortion statutes were challenged on grounds similar to those pleaded in *Wade*. The Georgia statutes, in contrast to the Texas statutes, represented a more modern approach to abortion, being fashioned after the MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962) which is set out in Appendix B of the opinion. *Id.* at 754. The Supreme Court closely scrutinized the various regulations contained in the Georgia laws and found most of the regulations to be overly broad and therefore unconstitutional. The Georgia statutes, as judicially amended, are set out in Appendix A. *Id.* at 752.

10. 20 DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (24th ed. 1965) (quickening usually occurs between the 16th and 18th week of pregnancy).

11. Anonymous, Y.B. Mich. 1 Edw. 3, f. 23, pl. 18 (1327). See Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L. FORUM 335, 337 (1971) [hereinafter cited as *Means*].

12. E. COKE, INSTITUTES 50-51 (1648).

13. *See, e.g.*, Cheaney v. State, — Ind. —, 285 N.E.2d 265 (1972).

14. Means, *supra* note 11 at 345-48, stating that Coke probably misstated the law intentionally.

15. 93 S. Ct. at 718.

16. 93 S. Ct. at 726 (citations omitted). As early as 1891, the Court stated that:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

17. As expressed by the *Wade* Court, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." 93 S. Ct. at 726 (citations omitted).

diverse sources within the Bill of Rights, the source depending upon the circumstances of the particular case under consideration. More importantly, such a right has been found to exist in several contexts concerning the family milieu.[18]

The fountainhead upon which virtually all of the abortion cases have relied is *Griswold v. Connecticut*.[19] In *Griswold*, the Supreme Court struck down a Connecticut statute prohibiting the dissemination of information and the giving of advice and instruction concerning contraception. The Court held the statute to be violative of couples' rights of marital privacy, including the right to determine for themselves whether to use contraceptives. The *Griswold* "doctrine" was extended in *Eisenstadt v. Baird*,[20] wherein the Court invalidated a Massachusetts statute which permitted married persons to obtain contraceptives but which denied the same right to single persons. The Court held that there exists a fundamental right of privacy which "is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[21] The *Wade* Court, after discussing the right of privacy as enunciated in *Griswold* and *Eisenstadt*, extended the principle of those cases to the abortion decision, concluding that the "right to privacy . . . is broad enough to encompass a woman's decision whether to terminate her pregnancy."[22]

Prior to *Wade*, the state and federal courts were split on the abortion issue. Approximately one-half upheld the state abortion statutes under review, while the other half invalidated the statutes in question.[23] Those courts that chose to uphold the statutes did so on one of two grounds: that the right of privacy as enunciated by *Griswold* did not extend to the abortion question, or, assuming that it did, that the state has a legitimate and compelling interest in preserving the life of the mother and that of the fetus, entitling it to regulate or even proscribe abortion.[24]

Virtually all of these courts accepted the principle of privacy, as

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18. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child education); Meyer v. Nebraska, 262 U.S. 390 (1923) (child rearing).

19. 381 U.S. 479 (1965) [hereinafter referred to as *Griswold*].

20. 405 U.S. 438 (1972) [hereinafter referred to as *Eisenstadt*].

21. *Id.* at 453 (emphasis in original).

22. 93 S. Ct. at 727. Prior to the *Wade* decision, many state and federal courts held that this right of privacy existed within the ninth amendment, while other courts relied on the fourteenth amendment due process clause. *Compare* Crossen v. Attorney General, 344 F. Supp. 587 (E.D. Ky. 1972) *with* Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972). *See also* YWCA v. Kugler 342 F. Supp. 1048, 1072 (D.N.J. 1972). The *Wade* Court held that the right of privacy, with respect to the abortion question, lies within fourteenth amendment due process thereby resolving the conflict. 93 S. Ct. at 727.

23. 93 S. Ct. at 727-28 and cases cited therein. *E.g.*, Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

24. Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Cheaney v. State—Ind. —, 285 N.E.2d 265 (1972); State v. Munson, 86 S.D. 663, 201 N.W.2d 123 (1972).

enunciated in *Griswold* and *Eisenstadt*; nevertheless, extension of the doctrine was resisted when applied to the particular abortion case under consideration on the ground that there was a basic distinction between contraception on one hand and abortion on the other. For example, the Supreme Court of South Dakota stated in *State v. Munson*,[25] that "[t]here is a fundamental difference between the right to use contraceptives and the right to terminate a pregnancy."[26] In *Cheaney v. State*,[27] the Supreme Court of Indiana declared, though in a somewhat different context, that:

> The existence of an unborn child distinguishes this case from Griswold v. Connecticut or Eisenstadt v. Baird. Those cases involved the right to receive contraceptives while this case involves abortion, the *fundamental distinction* being the difference *between prevention and destruction.*[28]

The *Wade* Court did not detail its reasons for making this extension, other than to state that the right was "broad enough."

The most difficult issue confronting the *Wade* Court was whether the state's compelling interest in abortion outweighed the pregnant woman's right of privacy. It was this issue which had created the greatest controversy among the lower courts.[29] After examining the lower court cases, the *Wade* Court concluded that a pregnant woman's right of privacy to determine whether to abort was not absolute. Instead, it found that it was a qualified right, inasmuch as it must be balanced against the state's interest in abortion generally. The Court first found that the state has two "separate and distinct" interests in abortion: one being its interest in the preservation of the life and health of the pregnant woman; the other being its interest in the preservation of fetal life. The Court then determined that it was not enough for the state to demonstrate that its interests were merely legitimate; instead the state was required to establish that its interests were "compelling" before it would be allowed to interfere with a woman's right to abort.[30] Therefore, there arose in *Wade* the narrow issue: At what stage of pregnancy, if at all, does the

25. 86 S.D. 663, 201 N.W.2d 123 (1972).

26. *Id.* at 667, 201 N.W.2d 125.

27. — Ind. —, 285 N.E.2d 265 (1972).

28. *Id.* at 269 (citations omitted) (emphasis in original).

29. *Compare* Cheaney v. State, — Ind. —, 285 N.E.2d 265 (1972) *with* People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

30. In his dissent Mr. Justice Rehnquist vigorously challenged the majority's reliance on the "compelling state interest test," asserting that this test is one which has been traditionally applied to equal protection cases, whereas the "rational relation test" has been the test traditionally applied to substantive due process cases. Justice Rehnquist concluded that:

> Unless I misapprehend the consequences of this transplanting of the 'compelling state interest test,' the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

93 S. Ct. at 737. However, there is authority to the effect that when fundamental personal rights are at stake, the more stringent "compelling state interest test" is required even in substantive due process cases. Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

state's interest in abortion become compelling? It was precisely on this point that the Court decided to effect a compromise,[31] labeling it the "trimester plan."

With respect to the state's interest in the life and health of the woman, the Court held that the "compelling point" attaches after the end of the first trimester of pregnancy. After examining recent medical data purporting to establish that for the first several weeks of pregnancy, abortion is medically safer than childbirth,[32] the Court concluded that during the first trimester the state may not interfere with the woman's right to abort.[33] However, for the stages subsequent to the end of the first trimester, the Court held that the state may regulate abortion procedures in any manner rationally related to the preservation of the woman's life or health. Such regulation can include licensing and other qualification standards for both the person who performs an abortion and the facilities in which it may be performed.[34]

With respect to the state's interest in fetal life, however, the Court was faced with a much more sensitive and hotly debated issue. After initially refusing to decide when life begins,[35] the Court characterized the fetus as "potential life" and held that viability is the stage at which the state's interest in the fetus becomes compelling. The Court reasoned that viability is the logical choice, stating "[t]his is so because the fetus then presumably has the capability of *meaningful* life outside of the mother's womb."[36] The Court then concluded that "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications."[37] The result of this holding is that the state may proscribe

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31. Jane Roe argued that her right to terminate her pregnancy was absolute so that she could abort whenever she alone desired, whereas Texas argued that it had a compelling interest in the fetus from conception, so that it could proscribe abortion from the outset.

32. Tietze, *Morality With Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969) (stating that today early-pregnancy abortion is as much as seven times safer than childbirth).

33. Even though the Court held that the state cannot interfere with a woman's decision, it recognized that the decision is still primarily a medical one, requiring the consent of the woman's physician in *all* cases.

34. The examples given by the *Wade* Court have proven to be somewhat illusory when considered in light of the treatment afforded a Georgia statute in Doe v. Bolton, 93 S. Ct. 739 (1973). *Doe v. Bolton*, a companion case to *Wade*, held the following statutory regulations of abortion procedure to be invalid under fourteenth amendment due process standards:

(1) the requirement that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals;
(2) the requirement that the woman's physician obtain two concurring opinions before performing the abortion;
(3) the requirement that the woman's physician obtain the approval of the hospital's abortion committee; and
(4) the residency requirement.

Id. at 748.

35. 93 S. Ct. at 730. The Court confused the issue however, by implying that life does not begin until live birth.

36. 93 S. Ct. at 732 (emphasis added).

37. *Id.*

abortion only subsequent to viability (during the third trimester) except when an abortion is necessary to preserve the life or health of the mother.[38]

In contrast to the Supreme Court's analysis, the majority of lower courts which have upheld state abortion statutes have done so on the ground that the state has a compelling interest in fetal life from the moment of conception.[39] Although few courts were willing to assert that a fetus (especially in early development) is a human life in the traditional sense, many courts recognize that some form of "potential life" or "unique physical entity" exists from the moment of conception.[40] For example, in *Cheaney v. State*,[41] the court held that the state's interest in fetal life becomes compelling at conception in that

> [i]t is now established that some sort of independent life begins at conception . . . [so that] . . . "biologically as well as ethically the only logical and satisfactory view of the embryo is to regard it as a human being from the outset."[42]

On the other hand, several courts have disregarded this "conception argument." They have instead chosen to rely upon tort concepts,[43] or upon the bare assertion that the mother's right to abort simply outweighed the right of the fetus to exist.[44]

The abortion controversy has been characterized by one court as "an explosive mixture of medical, moral, social, and religious issues and concepts."[45] Yet, in *Roe v. Wade*, the Supreme Court chose to decide the merits of the case recognizing that whatever its decision, it would be subjected to storms of criticism. The result, of course, was the compromise "trimester plan." No doubt, constitutional scholars will cringe (as did Justice Rehnquist) at the Court's broad trimester scheme, promulgated in a case devoid of any facts as to the stage of pregnancy to which Jane Roe had advanced when her suit was commenced.[46] Perhaps not

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38. It is important to distinguish between characterizing a fetus as a human life, and characterizing a fetus as a "person." The court expressly rejected the argument that a fetus is a "person" in the Constitutional sense, thereby having fourteenth amendment due process rights of its own. 93 S. Ct. at 729 & n.54.

39. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971); Cheaney v. State, — Ind. —, 285 N.E.2d 265 (1972); State v. Munson, 86 S.D. 663, 201 N.W.2d 123 (1972). *See* Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233, 240 (1969).

40. *E.g.*, Corkey v. Edwards, 322 F. Supp. 1248, 1253 (W.D.N.C. 1971).

41. — Ind. —, 285 N.E.2d 265 (1972).

42. *Id.* at 268.

43. *See, e.g.*, YWCA v. Kugler, 342 F. Supp. 1048, 1075 (D.N.J. 1972).

44. Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970).

45. State v. Munson, 86 S.D. 663, 671, 201 N.W.2d 123, 127 (1972).

46. As Mr. Justice Rehnquist observed, the Court departed from the well-established precedent that the Court will never create a rule broader than necessary, based on the facts in the record before it. Since there was nothing in the record indicating to what stage of pregnancy Jane Roe had progressed at the time her suit was commenced, there was no factual basis for the "trimester plan." 93 S. Ct. 736 (Rehnquist, J., dissenting).

since *Miranda v. Arizona*[47] has the Court been so vigorously accused of judicial legislation. However, in spite of the opinion's technical infirmities, the Supreme Court will most likely adhere to the given test.

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SECURITIES REGULATION: INVESTMENT CONTRACT REDEFINED

Defendants offered for sale to the public unique forms of self-improvement courses called "Adventures" and "Plans." In return for an investment of from one to five thousand dollars, purchasers received certain promotional materials, the opportunity to attend group seminars, and the right to enroll in a training course—all of which were geared to indoctrinating purchasers in the technique of selling "Dare To Be Great" courses to others. After completion of the training course, purchasers became "independent sales trainees," eligible to earn commissions from sales made by defendants to individuals whom the purchaser had brought to the "Adventure Meetings." The Securities and Exchange Commission sought to enjoin defendants from offering these schemes for sale, claiming violation of the registration and anti-fraud provisions of the Securities Act of 1933[1] and the Securities Exchange Act of 1934.[2] The Commission charged that these courses were part of a pyramid promotional sales plan which constituted an investment contract and, as such, a security within the meaning of the federal securities laws.[3] The Commission likened defendant to a double-level franchising operation in which the success of each individual franchisee is inextricably tied to the success of the entire franchising system.[4] Unless investors are given the opportunity to exercise practical and actual control over the managerial decisions of the entire enterprise, the Commission argued, such investors should be afforded

47. 384 U.S. 436 (1966).

1. 15 U.S.C. § 77(a)-(g), (j), (k), (q), (t), (w) (1970).
2. 15 U.S.C. § 78(a)-(c), (l), (r), (u), (z) (1970).
3. The Securities Act of 1933 defines "security" as
> any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77(b)(1) (1970) (emphasis added). The Securities and Exchange Act of 1934 defines "security" in virtually the same language. 15 U.S.C. § 78(c)(a)(10) (1970).

4. *See Applicability of the Securities Laws to Multi-Level Distributorship and Pyramid Sales Plans*, SEC Securities Act Release, No. 5211 (Nov. 30, 1971).